**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

| | | |
|---|---|---|
| KENNETH ALAN LINDSAY,<br><br>Claimant,<br>v.<br><br>SNAKE RIVER AUTO BODY & PAINT,<br><br>Employer,<br>and<br><br>TRUCK INSURANCE EXCHANGE,<br><br>Surety,<br>Defendants. | ) | **IC 2007-009451**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>FILED MAR 8 2010 |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Twin Falls on June 11, 2009. Claimant appeared *pro se*. Jon Bauman represented Defendants. The parties presented oral and documentary evidence. The parties submitted briefs. The case came under advisement on September 15, 2009. It is now ready for decision.

## ISSUES

The issues to be resolved according to the amended notice of hearing are:

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment;
2. Whether the condition for which Claimant is seeking benefits was caused by the alleged industrial accident;
3. Whether Claimant's condition is due in whole or in part to a subsequent intervening cause; and
4. Whether and to what extent claimant is entitled to:
    a. temporary disability from February 22 through June 26, 2007, inclusive, and
    b. Medical care benefits.

## CONTENTIONS OF THE PARTIES

Claimant contends he injured his low back while lifting and moving a pickup bed with three other employees. He has been unable to work since. He seeks only temporary disability and medical care benefits.

Defendants contend Claimant was not involved in an accident. Coworkers say they specifically prevented Claimant from lifting the pickup bed because they were aware of Claimant's preexisting back problem. It is the preexisting condition, not injury from an accident, which caused his need for medical treatment. Claimant failed to establish a *prima facie* case because he failed to provide qualified medical opinion to establish causation. He is not entitled to benefits.

## EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, and of Employer's employees and former employees, Jamie Thurber, Chris Miller, James Fewkes and John Holland;
2. Claimant's Exhibits A through L, except page 17 of Exhibit B; and
3. Defendants' Exhibits 1, 6 through 10, and 12 through 20.

Defendants objected to certain other portions of exhibits at hearing, the ruling on which was reserved. After further review, Defendants' objections are overruled. Having examined the evidence, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

## FINDINGS OF FACT

1. Claimant worked for Employer. He performed auto body work as required by Employer.

2. On February 22, 2007, a pickup bed was moved by hand from the mechanic's

bay to the painter's bay. Four employees took one corner each and a fifth man guided the support stands in place. The operation was conducted without accident or incident.

3. Claimant approached to help, but was not allowed to help lift or carry the pickup bed. Coworkers and supervisors were aware Claimant had a "bad back."

4. Claimant testified that he actually helped lift the pickup bed. He felt pain the following day and left work early on Friday, February 23. He told a supervisor, Rick Burley, that his back was hurting. He worked all day Monday, February 26. He again reported his back was hurting without asserting it was related to any work activity. He did not work for Employer again.

5. On March 1, Claimant notified Employer of his claim that his back pain was related to the lifting incident on February 22. He first sought medical attention through David Jensen, D.O., on March 2.

6. Surety investigated. Based on the statements of coworkers about the February 22 event and information about Claimant's prior back complaints, Surety denied the claim on April 8, 2007.

7. Minor inconsistencies arise among various documents which suggest Claimant may have revised his story, changing the accident date from February 23 to February 22 and changing from one to another individual as having been present. These inconsistencies do not detract from Claimant's credibility. The corrections were made promptly and may represent innocent errors.

8. After some initial treatment and diagnostic imaging, on March 19 Dr. Jensen diagnosed lumbar radiculopathy and "lumbar spondylosis with severe degenerative disc disease."

9. On April 16, Dr. Jensen used the phrase "advanced degenerative changes in his

lumbar spine" when he diagnosed a herniated nucleus pulposus (HNP).

10. On April 17, an MRI confirmed the HNP which compressed the left S1 nerve root.

11. On May 9, David Christensen, M.D., performed an examination prior to recommending surgery. He diagnosed, "Left S1 radiculopathy secondary to left L5-S1 HNP caused by lifting incident at work February 22, 2007 (per patient)."

12. On May 14, David Christensen, M.D., performed surgery. He removed the offending disc material.

13. Claimant's back symptoms resolved well after surgery. He reported some minor complaints, mostly unrelated to his back. He did experience some constipation which was initially thought to be related to the narcotic pain medication prescribed for his back, but the clinical picture was equivocal.

14. By June 26, Dr. Christensen opined Claimant's back had healed, and Claimant should increase activity and resume normal activities as tolerated. On a July 10 visit, Dr. Christensen released Claimant to work without restriction, effective back to the June 26 date.

15. On March 4, 2008, David Preucil, M.D., provided a letter at Claimant's request. In relevant part it stated: "His pain medication was being utilized secondary to a lumbar radiculopathy, which per her (sic) history was sustained in an industrial accident in February of 2007. I believe his hospitalization can be directly related to this accident as the medications utilized secondary to the accident were responsible for his symptoms."

**Prior Medical History**

16. Claimant sought medical treatment in 2000 for low back pain. He reported radiculopathy into his left leg. X-rays showed generalized osteopenia.

## DISCUSSION AND FURTHER FINDINGS OF FACT

17. **Accident and Injury.** "'Accident' means an unexpected, undesigned, and unlooked for mishap, or untoward event, . . . which can be reasonably located as to time when and place where it occurred, causing an injury." Idaho Code 72-102(18)(b). The event described by Claimant did not involve a mishap or untoward event. The pickup bed was moved successfully without incident.

18. Where the injury can be reasonably located in time and place, an accident may be found to have occurred. *See*, *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005); *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983). In both *Page* and *Wynn*, the injury was immediately apparent. Both claimants felt immediate pain – Ms. Page felt knee pain as she arose from a seated position and Mr. Wynn felt back pain as the equipment he was operating bounced. Here, Claimant's facts are unlike both cases. He worked the remainder of the day, February 22, without reporting back pain. He reported back pain the following day, but did not attribute it to any work activity then. He returned to work Monday with back complaints but still did not attribute it to any work activity. It was not until March 1 that he first alleged his back pain had been caused by lifting a pickup bed.

19. There was no accident discernable at the time of the event. Instead, one full week later, in hindsight, Claimant grasped at the alleged pickup bed lifting as the event he would have the Commission deem an accident.

20. Claimant's supervisors and some of his coworkers were aware Claimant had intermittent back complaints. Their concern for his welfare caused them to decline his offered assistance lifting the pickup bed.

21. Testimony was conflicting about whether Claimant lifted the pickup bed.

Mr. Miller, Mr. Fewkes, and Mr. Holland recalled the event differently. They recalled different people involved at different corners or sides when the pickup bed was lifted and carried. Mr. Miller testified that Claimant may have touched or begun to lift the pickup bed before he (Mr. Miller) told Claimant not to help. The other two testified that Claimant did not touch the pickup bed; Claimant was warned away first. These conflicts in the testimony about "who did what and who stood where" underscore the likelihood that each witness is giving his own best recollection, that Employer did not concoct a story for its employees to testify to. Testimony was conflicting about whether Claimant lifted the pickup bed. The preponderance of evidence shows Claimant did not actually lift the pickup bed. Claimant failed to show an accident occurred.

22. **Causation**. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Magic words are not required. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

23. The note of Dr. Christensen and the letter of Dr. Preucil represent the best evidence of record of the medical opinions regarding causation. Both equivocate by expressly identifying their acceptance of Claimant's allegation as the basis for their opinions on causation. By expressly limiting the basis of their opinions, they effectively convey their lack of confidence in Claimant's allegation. Moreover, because the event has been found not to have occurred as Claimant alleged, the opinions of these doctors are without sufficient basis to establish causation as required by Idaho Workers' Compensation Law.

24. Claimant suffered a longstanding degenerative condition as demonstrated by the medical records in 2000. He made intermittent complaints of back pain thereafter. Claimant failed to establish a causal link between his work activity and the back pain for which he sought medical care in 2007.

25. All other issues are made moot, independently, by the finding that Claimant failed to show an accident occurred and by the finding that Claimant failed to show his back condition was caused by an industrial accident.

## CONCLUSIONS OF LAW

1. Claimant failed to show a compensable industrial accident occurred;

2. Claimant failed to show his back condition was caused by a work accident; and

3. All other issues are moot.

## RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 9TH day of February, 2010.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

| | | |
|---|---|---|
| KENNETH ALAN LINDSAY,<br><br>Claimant,<br>v.<br><br>SNAKE RIVER AUTO BODY & PAINT,<br><br>Employer,<br>and<br><br>TRUCK INSURANCE EXCHANGE,<br><br>Surety,<br>Defendants. | ) | **IC 2007-009451**<br><br>**ORDER**<br><br>FILED MAR 8 2010 |

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant failed to show a compensable industrial accident occurred.

2. Claimant failed to show his back condition was caused by a work accident.

3. All other issues are moot.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 8TH day of MARCH, 2010.

INDUSTRIAL COMMISSION

/S/_____
R. D. Maynard, Chairman

/S/_____
Thomas E. Limbaugh, Commissioner

/S/_____
Thomas P. Baskin, Commissioner

ATTEST:

/S/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 8TH day of MARCH, 2010, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

Kenneth Alan Lindsay
3627 North 2800 East
Twin Falls, ID 83301

Jon M. Bauman
P.O. Box 1539
Boise, ID 83701

db

/S/_____